

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF AMENDMENT AND
ARM 1.3.211 through 1.3.224,)	REPEAL
1.3.226, 1.3.227, 1.3.229 through)	
1.3.233; and repeal of ARM 1.3.225,)	
all pertaining to model rules)	

TO: All Concerned Persons

1. On May 22, 2008, the Department of Justice published MAR Notice No. 23-20-192, pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 988 of the 2008 Montana Administrative Register, Issue Number 10.

2. A public hearing was held on June 11, 2008. No adverse comments or suggestions were offered at the public hearing. The department received written comments from two individuals regarding the proposed adoption.

Comment: Comments were provided regarding the style and grammar of the rule notice.

Response: The department made changes, reflected in this notice of adoption, as appropriate.

Comment: Comment was provided that the department's amendment to ARM 1.2.211 regarding applicability of agency rules was overbroad.

Response: The department's notice of adoption amends rule 1.3.211 to clarify its applicability.

Comment: Comment was provided that the rule 1.3.212, which governs the notice that must be provided in contested case hearings, should be clarified to note that not all notices of contested case hearings must include an automatic stay or a statement revoking a party's rights.

Response: The department's notice of adoption amends rule 1.3.212 to clarify that the notice of a contested case hearing must only include notice of a stay or revocation of rights in applicable cases.

Comment: Comment was provided recommending revision to rule 1.3.217 to clarify that an agency may request discovery in, for example, a proceeding before another agency or separate board.

Response: The department considered the comment and determined amendment to rule 1.3.217 was not necessary. The rule provides that discovery is

available to "the parties" and in the example cited in the comment the agency would be a party to an action and thus entitled to discovery.

Comment: Comments were received recommending that rule 1.3.219 be amended to clarify that the party who bears the burden of proof in a contested case proceeding is required to present its case first.

Response: The department's notice of adoption amends rule 1.3.219 to clarify that the party asserting a claim for relief bears the burden of proof and is required, in most circumstances, to present its evidence first. This change is consistent with the Montana Supreme Court's decision in Montana Environmental Information Fund v. DEQ, et al, 2005 MT 502, 112 P.3d 964.

Comment: Comments were provided regarding rule 1.3.230 which governs agency subpoena power. The comment recommended that the rule be revised to clarify that the issuing agency or the requesting party may petition a district court to compel compliance with a subpoena.

Response: The department's notice of adoption amends rule 1.3.230 to make this clarification.

3. The department has amended the following rules as proposed, but with changes from the original proposal, new matter underlined, deleted matter interlined:

1.3.211 CONTESTED CASES, INTRODUCTION (1) A rule is an agency statement of general applicability that interprets law or describes agency requirements. It applies to all persons who are subject to the requirements or regulations of the agency and comes within the terms of the rule. A contested case involves an agency determination that affects the rights or responsibilities of a specifically named party. "Contested case" and "party" are defined by 2-4-102, MCA.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.212 CONTESTED CASES, NOTICE OF OPPORTUNITY TO BE HEARD
(1) All parties to contested cases ~~shall~~ must be ~~afforded~~ provided notice of hearing. As illustrated by sample form 212a, the notice must include:

(a) through (f) remain as proposed.

(g) if applicable, a statement ~~either~~ staying the agency action or detailing at what point the party's legal rights, duties, or privileges will be revoked or imposed.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.216 CONTESTED CASES, APPLICATION FOR MORE DEFINITE AND DETAILED STATEMENT (1) ~~Upon application to the agency or the designated~~

hearing examiner, a A party who has been given notice of a contested case hearing may apply to the agency or the designated hearing examiner for a more definite and detailed statement of the issues involved in the hearing.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.217 CONTESTED CASES, DISCOVERY (1) In all contested cases, discovery ~~shall be~~ is available to the parties in accordance with Rules 26 through 37 of the Montana Rules of Civil Procedure. However, Rule 27 and Rule 37(b)(1) and 37(b)(2)(D) shall not apply. ~~Provided, however, all~~ All references to the "court" shall be considered to refer to the appropriate "agency"; all references to the use of the subpoena power shall be considered references to ARM 1.3.230; all references to "trial" shall be considered references to "hearing"; all references to "plaintiff" shall be considered references to "a party"; all references to "clerk of court" shall be considered references to the person designated by the department head to keep documents filed in a contested case.

(2) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the agency in which the action is pending, the refusal to obey ~~such~~ the agency order shall be enforced as provided in ARM 1.3.230.

(3) remains as proposed.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.218 CONTESTED CASES, HEARING EXAMINERS

(1) through (2)(b) remain as proposed.

(c) provide for the taking of testimony and depositions;

(2)(d) through (4) remain as proposed.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.219 CONTESTED CASES, HEARING (1) and (2) remain as proposed.

(3) ~~At the discretion of Absent a determination by the presiding officer, the hearing may be conducted in the following order: that the interests of justice require otherwise, the order of hearing is as follows:~~

(a) any opening statements requested or allowed by the presiding officer;

(b) presentation of evidence by the agency party asserting a claim for relief (the challenging party);

(c) cross examination by the ~~challenging~~ opposing party;

(d) presentation of evidence by the ~~challenging~~ opposing party;

(e) cross examination by agency the challenging party; and

(f) through (4) remain the same.

(5) Exhibits ~~shall~~ must be marked and ~~shall~~ must identify the person offering the exhibits. The exhibits shall be preserved by the agency as part of the record of

the proceedings.

(6) The presiding officer may hear closing arguments, request written argument, or order a briefing schedule for parties to submit proposed findings of fact and conclusions of law.

(7) remains as proposed.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.220 CONTESTED CASES, RECORD (1) The record in a contested case ~~shall~~ must include:

(a) through (f) remain as proposed.

(2) At the request of any party, the record must be transcribed. The cost of transcription ~~will be~~ is the responsibility of the requesting party.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.223 CONTESTED CASES, PROPOSED ORDERS (1) If a majority of the officials of the agency who are to render the final decision have not heard the case, a decision that is adverse to a party (other than the agency itself) may not be ~~rendered~~ made until a proposed decision is served upon the parties and the parties are given an opportunity to file exceptions and briefs, and present oral argument to the officials responsible for ~~rendering~~ making a final decision.

(2) through (4) remain as proposed.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.224 CONTESTED CASES, FINAL ORDERS (1) A final decision or order adverse to a party in a contested case ~~shall~~ must be in writing and must include findings of fact and conclusions of law.

(2) remains as proposed.

(3) Parties and their attorneys ~~shall~~ must be served with a copy of a final decision or order.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.226 DECLARATORY RULINGS, INTRODUCTION (1) A party may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.229 DECLARATORY RULINGS, EFFECT (1) remains as proposed.

(2) A declaratory ruling or notice of refusal to issue ~~such~~ a ruling is a final agency decision subject to judicial review in the same manner as decisions or orders in contested cases.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.230 GENERAL PROVISIONS, SUBPOENAS (1) remains as proposed.

(a) Subpoenas ~~shall~~ must be issued and served pursuant to the rules of civil procedure. Except as otherwise provided by law, costs associated with the subpoena must be paid by the party who requested it.

(b) In case of disobedience, an agency or other party may petition a district court to compel compliance with a subpoena or the giving of testimony.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.231 GENERAL PROVISIONS, REPRESENTATION (1) A person

appearing before the agency has the right to be accompanied, represented, and advised by counsel. The agency should advise a party to a contested case of ~~his~~ the right to counsel.

(2) A corporation appearing before ~~the~~ an agency is considered a separate legal entity and may not appear on its own behalf through an agent other than an attorney.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.233 GENERAL PROVISIONS, PUBLIC INSPECTION OF ORDERS AND DECISIONS (1) ~~The agency~~ Agencies must maintain an index of all final orders and decisions in contested cases and declaratory rulings. All final decisions and orders ~~shall~~ must be available for public inspection on request. Copies of final decisions and orders must be given to the public on request after payment of the cost of duplication.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

4. The department has amended ARM 1.3.213, 1.3.214, 1.3.215, 1.3.221, 1.3.222, 1.3.227, and 1.3.232, and repealed ARM 1.3.225 as proposed.

By: /s/ Mike McGrath
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/s/ Ali Bovington
ALI BOVINGDON
Rule Reviewer

Certified to the Secretary of State on August 4, 2008.